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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-741

THE FIFTH AVENUE PEACE PARADE COMMITTEE, an unincorporated association and DEBORAH D. WEISBURD and ROBERT H. SILK, Individually and on behalf of all other persons similarly situated,

Petitioners,

—v.—

CLARENCE M. KELLEY, Director of the Federal Bureau of Investigation, JOHN F. MALONE, Assistant Director in Charge of the Federal Bureau of Investigation in New York City and THE AMALGAMATED BANK OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners,

—v.—

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a petition for a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on June 12, 1973, affirming dismissal of the complaint on the ground that petitioners failed to present a justiciable controversy.

Opinions Below

The opinion of the United States Court of Appeals affirming the judgment of the United States District Court for the Southern District of New York (Oakes, J., dissenting) is reported at 480 F.2d 326 and is set forth in the Appendix *infra*, pp. 1a-22a. The order of the Court of Appeals denying the petition for a rehearing *en banc* (Oakes, J., dissenting) is set forth in the Appendix, *infra*, pp. 40a-41a. The District Court's findings of fact and conclusions of law are not officially reported and are set forth in the Appendix, *infra*, pp. 23a-37a. The opinion of the District Court denying respondents' motion to dismiss the complaint for lack of subject matter jurisdiction is reported at 327 F. Supp. 238.

Jurisdiction

The judgment of the Court of Appeals was entered on June 12, 1973 (Appendix *infra*, pp. 38a-39a) and a timely petition for rehearing *en banc* was denied by order entered on July 10, 1973 (Appendix *infra*, pp. 40a-41a). By order dated September 26, 1973, Mr. Justice Marshall extended the time to file this petition until November 7, 1973. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

Questions Presented

1. Does this Court's decision in *Laird* v. *Tatum*, require dismissal of petitioners' complaint on the ground of lack of justiciable controversy, where petitioners are engaged in constitutionally protected political activities and are challenging an unlawful and overbroad investigation of their activities, political associations and beliefs conducted by agents of the Federal Bureau of Investigation and the sub-

sequent unwarranted dissemination of the information collected?

2. Does a bank depositor present a justiciable controversy when it challenges an FBI search of bank records revealing protected political associations, without search warrant or subpoena as violative of the First, Fourth and Ninth Amendments?

Constitutional Provisions Involved

The following constitutional provisions are involved:

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Statement of the Case

Petitioner Fifth Avenue Peace Parade Committee ("the Committee") and the individual petitioners, members and officers of the Committee, have at all relevant times participated in activities designed to express non-violent opposition to the war in Southeast Asia (R162).*

A highpoint of petitioners' work was the Moratorium which took place in Washington, D.C. during the weekend of November 14-16, 1969. On that weekend, hundreds of thousands of Americans from all walks of life assembled in the Capital to petition their elected representatives and express their opposition to the war in Vietnam (R166-172).

The Committee together with other groups throughout the United States actively participated in the preparations for the Moratorium. For example, the Committee engaged charter bus companies to supply transportation to interested persons at a nominal cost. All money collected by the Committee for bus tickets for this purpose was deposited in at the respondent Amalgamated Bank of New York (hereafter "the Bank") under the Committee's account name "Washington Transportation Fund" (R171-2, 181, 202, 204, 210-11, 221).

The evidence in the record establishes that preparations for the Moratorium demonstration were carefully made and included numerous meetings between representatives of the Federal Government and representatves of the demonstrators. Preparations included choosing appropriate assembly

* "R" references are to the appropriate pages of the Appendix filed with the Court of Appeals.

sites, arranging routes for the march and installing various facilities for the demonstrators. Information concerning the number of persons expected to attend was routinely exchanged on a daily basis between the Government's representatives and the national organizing committee, of which the Committee was a constituent (R173-74, 178, 179, 272, 312-17, 321).

Triggered by nothing more than the Committee's participation in the preparations for the Moratorium, the FBI undertook an extensive investigation of the Committee's activities. The information collected was maintained at the New York office of the FBI in File No. NY 100-167288, specifically set up to serve as a repository for all the investigative reports and other information collected in this investigation. According to respondents, the file ultimately grew to eleven (11) volumes (R258-59).

The Government has never claimed that this investigation was undertaken in connection with any suspected or actual criminal or otherwise illegal activity. Indeed, the respondent federal officials have consistently maintained that the avowed purpose of the investigation was to ascertain the anticipated "size, scope and nature" of the Moratorium activities (R238, 294, 302, 414, 417, 452). Accepting this statement as true, however, merely emphasizes that the investigative acts were unauthorized and overbroad and inconsistent with their professed purpose. Moreover, the admitted dissemination of the collected information months after the Moratorium is utterly unjustified and itself constitutes an impermissible burden on First Amendment rights.

At a minimum, respondents' investigation of the Committee's political activities included the following:

1. Special Agent Constantino located the Washington Transportation Fund account at the respondent Bank. Although the agent did not have a search warrant, subpoena, court order or letter of authorization, he obtained from an unidentified "source," the records pertaining to the Committee's account, as well as a related account (R217-18, 238, 239, 240, 241, 254).

2. The information obtained about the account was recorded in an FBI investigative report known as an FD 302 report (Plf. Ex. 2, R487). The report, introduced in evidence at the trial, contains the following information:

(a) The name, address and account number of the Washington Transportation Fund;

(b) The date the account was opened;

(c) The amount of initial deposit only;

(d) The names of Judy Berr, Leon Craig and Norma Becker, officers of the Washington Transportation Fund authorized to sign checks, and members of the petitioner class;

(e) The name of petitioner Deborah Weisburd and Abe Weisburd, the officers of the supposedly related Labor Committee authorized to sign checks on that account; and

(f) The name of the Bank officer, Sarah T. Malloy, to be subpoenaed if public disclosure of the information is required.

According to the testimony of the FBI agents involved, this aspect of the investigation was consistent with its

over-all purpose to determine the size of the demonstration. Specifically, they claim that the Bank investigation was undertaken to learn how many buses and trains the Committee was financially able to charter (R265). Yet, it is apparent that none of the information obtained from the Bank (e.g. names of signatories, date account opened, amount of initial deposit) could conceivably assist in determining the number of people the Committee was transporting to the Moratorium. Moreover, the FD 302 report was not even typed until four days after the demonstration (R246, 247).

3. On the morning of November 15th, the FBI stationed 56 Special Agents at various departure points in New York City to observe the demonstrators boarding the buses chartered by the Committee for Washington, D.C. (R282-84).

4. Approximately three months after the Moratorium, in January or February, 1970, the New York office of the FBI prepared a two hundred page summary report of its eleven (11) volume investigative file (R119, 306). This summary report was sent to the FBI's Washington Bureau "long after the Moratorium day events were over with" (R300). In addition, respondents admitted disseminating reports of petitioner's Moratorium activities as follows:

> F.B.I. Headquarters, Washington, D.C. disseminated reports of plaintiffs' Moratorium Day activities to the United States Secret Service; United States Department of Justice; United States Internal Revenue Service; and the Office of Special Investigations (OSI), United States Air Force.

The New York City Division of the F.B.I. disseminated reports to the United States Secret Service, New York City; the 108th Military Intelligence Group, United States Army; and the Naval Investigative Service Office, United States Navy, New York City (R332).

Petitioners filed this lawsuit in June 1970 seeking a declaration that the FBI's investigation of their lawful political activities, including the inspection of their bank records, was overbroad and a violation of their First, Fourth and Ninth Amendment rights, an injunction against any further investigation or further dissemination of the FBI's investigation reports about them and destruction of the pertinent files.

Respondents refused to disclose their investigative reports or the nature of the information contained therein, and the District Court upheld their refusal. Accordingly, petitioners' knowledge of the scope and extent of the FBI's investigative and surveillance activities and dissemination of the information collected is limited. The District Court, during pre-trial discovery and at trial, consistently refused to permit petitioners to obtain the facts underlying the FBI's activities regarding them, although all such facts were solely in the possession of respondents. By its actions the District Court effectively precluded petitioners from discovering facts necessary to prove their claims. The District Court, for example:

(a) Vacated petitioners' notice to depose defendant John F. Malone and refused to permit petitioners to depose any other person having knowledge of the scope, nature and extent of the investigation (R125).

(b) Refused to permit petitioners to inspect the FBI's eleven volume investigative file (File No. 100-167288) opened specifically for the purpose of the investigation complained of and containing reports of the investigation (R137), although (i) the file was not classified secret (R306-7), (ii) there was no valid invocation of any privilege by the Attorney General, and (iii) the District Court did not itself inspect the contents of the file, other than to review, *in camera,* respondents' summary of its contents.*

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* Although the District Court denied petitioners' motion for inspection of the file, it was apparently troubled by respondents' refusal to voluntarily produce it. In a memorandum decision entered after the denial of petitioners' motion for inspection and following the Court's inspection of respondents' summary of the file, the District Court wrote:

> "On December 6, 1971, this court signed and filed an order regarding discovery matters in this suit. As required by a provision thereof, the court has received from the United States Attorney a Federal Bureau of Investigation Report No. NY 100-167288 [i.e., the summary] and inspected same *in camera*. This report is classified 'Secret.'
>
> "My inspection of the generally relevant materials engenders some astonishment as to (1) why the report is regarded and classified *'Secret'* and (2) what particular discovery benefits are conferred thereby on the parties in this case, save perhaps defendants. Nevertheless, recognizing that at least presently I may not be qualified and competent to be sure about such matters, I request that the Attorney General authorize release of pages 25 through 44 and 100 for possible use by both sides at trial for which counsel must be ready beginning January 4, 1972."

Nothing was ever produced. Respondents' counsel advised the District Court at the commencement of trial that "the Attorney General declines to produce those sections of the investigatory file requested by Your Honor" (R160). Moreover, toward the end of the trial, the FBI's New York Supervisor testified under oath that the file itself was not classified secret (R306-7). Petitioners again renewed their motion for production and pointed out that the Court's prior ruling rested on the belief that the file was "secret," a fact communicated to the Court by *ex parte* letter of respondents' counsel dated December 3, 1971 transmitting the re-

The unfortunate truth is that petitioners who have progressed with this action through preliminary motions, pretrial discovery, trial and appeal have been utterly frustrated in all their efforts to obtain disclosure of the facts concerning respondents' investigation of them. Without such disclosure, petitioners' right to trial was substantially prejudiced.

Although unnecessary to its decision, the Court of Appeals summarily sanctioned the District Court's unusual discovery rulings with the statement that it was "the unusual and exceptional case where the determination of the trial court (in discovery of Governmental documents) is set aside." 480 F.2d at 333.

Petitioners do not challenge the authority of the FBI to conduct a specific investigation to determine in advance the size of the Moratorium so that adequate preparations could be made to protect persons and property. The crux of petitioners' complaint is that the activities of the FBI were overbroad and went far beyond the professed purpose of the investigation. The information collected concerning petitioners' identities and political associations, and disseminated months after the Moratorium to wholly unrelated agencies such as the Internal Revenue Service, was not reasonably related to any legitimate governmental interest. That such governmental conduct was occasioned by nothing more than petitioners' participation in constitutionally protected activities underscores the unlawful nature of that conduct. Petitioners were not permitted to inspect any document evidencing such authority, and aside

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quested summary. (R119). The District Court nonetheless adhered to its prior ruling and refused to order production of the file or inspect its contents *in camera* (R238, 267-8, 311, 326-8, 464).

from some cryptic references in the testimony of FBI agents to some unspecified "Presidential directive" (R49) the record is barren of any evidence of "authority." *

WHY THE WRIT SHOULD BE GRANTED

I.

The court below misinterpreted the scope and meaning of the holding of this Court in *Laird* v. *Tatum*.

In ruling that petitioners failed to present a justiciable controversy, the majority of the Court of Appeals misread this Court's 5-4 holding in *Laird* v. *Tatum*, 408 U.S. 1 (1972), and ignored other decisions of this Court and other federal courts which have sustained as justiciable complaints by citizens challenging overbroad governmental action directed specifically at them which abridges First Amendment rights. See, e.g. *Plummer* v. *City of Columbus*, —— U.S. ——, 42 L.W. 3222 (October 16, 1973). Cf. *Broadrick* v. *Oklahoma*, —— U.S. ——, 37 L. Ed. 2d 830 (June 25, 1973).

Governmental conduct challenged as overbroad has been held to violate First Amendment rights not because the activity was aimed directly at free speech, but because such action had the tendency to cause people to limit their activities protected by the First Amendment. E.g., *Baird* v. *State of Arizona*, 401 U.S. 1 (1971); *Keyishian* v.

* Petitioners were not permitted to discover the precise nature of the alleged authority of the FBI to conduct this investigation. Recent disclosures in the Watergate hearings, however, illustrate that such "directive" is not always synonymous with a validly issued Executive Order, and can provide evidence of illegal or unconstitutional conduct emanating from the White House itself.

Board of Regents, 385 U.S. 589 (1967); *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965); *Baggett* v. *Bullitt,* 377 U.S. 360 (1964); *Gibson* v. *Florida Legislative Committee,* 371 U.S. 599 (1963); *Talley* v. *California,* 362 U.S. 60 (1960); *NAACP* v. *Alabama,* 357 U.S. 449 (1958); *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965); see *Laird* v. *Tatum,* 408 U.S. 1, 13 (1972). In one broad stroke, however, the majority below would close the doors of the federal courts to a wide variety of lawsuits in which citizens challenge overbroad governmental action directed specifically at them which intrudes into their personal affairs and political beliefs and associations.

Tatum does not support such radical alteration in the jurisdiction of the federal courts. Indeed, the Chief Justice in his majority opinion was careful to reaffirm prior decisions of this Court which expressly uphold the right of a plaintiff to challenge the exercise of governmental power that is "regulatory, proscriptive, or compulsory in nature." 408 U.S. at 11.* The only limitation enunciated by *Tatum* was that a plaintiff establish that he is "presently or prospectively subject to the regulations, proscriptions, or compulsions that he is challenging." *Id.*

Tatum, brought on behalf of a nationwide class of civilians, was a broad attempt to enjoin a practice by the

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* As Chief Justice Burger stated:

"In recent years this Court has found in a number of cases that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights. E.g., Baird v. State Bar of Arizona, 401 U.S. 1, 27 L. Ed. 2d 639, 91 S. Ct. 702 (1971); Keyishian v. Board of Regents, 385 U.S. 589, 17 L. Ed. 2d 629, 87 S. Ct. 675 (1967); Lamont v. Postmaster General, 381 U.S. 301, 14 L. Ed. 2d 398, 85 S. Ct. 1493 (1965); Baggett v. Bullitt, 377 U.S. 360, 12 L. Ed. 2d 377, 84 S. Ct. 1316 (1964)." *Id.*

United States Army of gathering information about mostly public political events, in aid of the Army's "civil disturbance mission." Writing for the majority, the Chief Justice took pains to point out that the plaintiffs in that case were not complaining about specific acts of government officials directed against them, but were challenging "the existence and operation of the [Army's nationwide] intelligence gathering system." 408 U.S. at 3. Reviewing prior decisions striking down governmental rules or practices which inhibited the exercise of First Amendment rights, the Chief Justice concluded that in each of these cases relief was granted to particular individuals who were the *direct* targets of the challenged governmental practice.

In this case, petitioners have precisely the kind of individualized claims that were found to be absent in *Tatum.* They have an intensely "personal stake" in the outcome of the litigation*—they are the subjects of the challenged investigation; their bank accounts have been investigated; their political activities watched; and it is they who have been the subject of widely disseminated reports long *after* the investigation was over. Moreover, they are the persons who are intimidated by the knowledge that the eleven volume file on their activities and political views is still maintained and disseminated by the FBI. Not only are petitioners complaining about police actions which never occurred in *Tatum,* but they are the very persons directly affected by those actions.

The *Tatum* plaintiffs sought to have the federal courts review the military intelligence gathering system in the

* See e.g., *Flast* v. *Cohen,* 392 U.S. 83, 95 (1968); *Baker* v. *Carr,* 369 U.S. 186, 198 (1962).

abstract and determine whether it was appropriate to the Army's mission. The majority of this Court refused to do so on the ground that the *Tatum* plaintiffs had demonstrated insufficient individualized interest in the Army surveillance system to warrant judicial review.

Such an abstract determination is not sought at bar. The Court is not asked to review the broad policies of the Executive Branch with respect to the functioning of one of its agencies. Rather, it is asked to determine petitioners' narrow claim that specific investigative acts directed against them were overbroad and unrelated either to the avowed purpose of the investigation or to any legitimate governmental interest. As Judge Oakes stated succinctly in his dissent: "[I]t is totally immaterial to the ascertainment of the number of protesters going to Washington to know or list the names of the people authorized to sign checks on the Washington Transportation Fund." 480 F.2d at 335.

This Court has repeatedly struck down as unconstitutional governmental investigative activity destructive of associational rights in the absence of an overriding showing of governmental need. E.g., *Bates* v. *City of Little Rock,* 361 U.S. 516 (1960); *Shelton* v. *Tucker,* 364 U.S. 479 (1960); *Gibson* v. *Florida Investigation Committee,* 372 U.S. 539 (1963). In *Gibson,* this Court cautioned:

> ". . . regardless of the label applied, be it 'nexus', 'foundation,' or whatever—that it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a *substantial relation* between the information sought and a subject of overrid-

ing and compelling state interest." 372 U.S. at 546 (emphasis added).

The majority opinion below completely ignores these principles and the adverse and undesirable impact on the free exercise of First Amendment rights generated by the presence of government surveillance of the political marketplace. As Judge Oakes recognized in his dissenting opinion:

> "*Bates, Patterson* and *Louisiana ex rel. Gremillion* v. *NAACP, supra,* are the staunchest of authorities for the right of the members of the Fifth Avenue Peace Parade Committee to have remained anonymous and not to have had—for whatever purposes Big Government might wish to make further use of them—their names listed and kept in 'security agency files'." 480 F.2d at 335.

Furthermore, it is important to point out that this Court specifically indicated that had the facts in *Tatum* been similar to those in this case, the complaint would not have been dismissed. In his opinion the Chief Justice quoted a passage of the Court of Appeals opinion which "properly identified the issue presented":

> "There is no evidence of illegal or unlawful surveillance activities. *We are not cited to any clandestine intrusion* by a military agent." 408 U.S. at 9, quoting 444 F. 2d at 953 [emphasis supplied].

This case contains all the evidence of "clandestine intrusion" that this Court found lacking in *Tatum.* Faced with the allegations made here, the Court should sustain the

complaint for reasons set forth at the conclusion of its *Tatum* opinion:

> "[W]hen presented with claims of judicially cognizable injury . . . federal courts are fully empowered to consider claims of those asserting injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied." 408 U.S. at 15-16.

It is significant in this respect that other challenges to overbroad police surveillance of political activities have recently gone to trial.* In those few cases which have been decided on the merits following a trial, there has been considerable disagreement at the appellate level about the scope of *Laird* v. *Tatum, supra.* Compare for example, the majority and dissenting opinions below with the majority and dissenting opinions in *Donohoe* v. *Duling*, 465 F.2d 196 (4th Cir. 1972).

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* See, e.g., *Yaffe* v. *Powers*, 454 F.2d 1362 (1st Cir. 1972), reversing 71-514-J (D. Mass. June 13, 1971), and remanding for class action determination and discovery proceedings; *Handschu* v. *Special Services Division*, 349 F. Supp. 766 (S.D.N.Y. Oct. 24, 1972) (Weinfeld, J.) (denying motion to dismiss); *Bach* v. *Mitchell*, No. 71-6-22, —— F. Supp. —— (W.D. Wis. January 12, 1973) (denying motion to dismiss); *Philadelphia Resistance* v. *Mitchell*, No. 71-1738 —— F. Supp. —— (E.D. Pa. Dec. 27, 1972) (ordering discovery on extent of undercover surveillance of political activities); *Kent State University Vietnam Veterans Against the War* v. *Fyke*, No. C 72-1271 (N.D. Ohio, July 19, 1973) (denying motion to dismiss); *Holmes* v. *Church*, 70 Civ. 5691 (S.D.N.Y. June 14, 1971) (enjoining police surveillance of political activists "neither suspected of nor engaged in criminal activity"); *Anderson* v. *Kugler*, 56 N.J. 210, 265 A.2d 278 (1970), reversing 106 N.J. 545 (Ch. Div. 1969), and remanding for evidentiary hearing; *Philadelphia Yearly Meeting* v. *Tate*, 71 Civ. 849 (E.D. Pa. July 14, 1972) (denying motion to dismiss).

Quite apart from these cases, all litigated in the shadow of *Laird* v. *Tatum*, *supra*, federal judicial scrutiny of covert police intelligence-gathering operations in areas touching upon First Amendment rights is well established. Where the police are not gathering evidence of a specific crime but are conducting intrusive and generalized surveillance, courts have not hesitated to enjoin the intrusion. See, e.g., *Bee See Books, Inc.* v. *Leary*, 291 F. Supp. 622, 627 (S.D.N.Y. 1968), *Furniture Workers Local 309* v. *Gates*, 75 F. Supp. 620 (N.D. Ind. 1948). Cf. *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Company*, 301 U.S. 58 (1937); *United States* v. *McLeod*, 385 F.2d 734, 750 (5th Cir. 1967).

II.

The court below erred in dismissing as non-justiciable petitioners' claim that the FBI's inspection of their bank records without legal process violated their First Amendment right to associational privacy and their Fourth Amendment right to be secure from unreasonable searches and seizures.

The majority below summarily dismissed petitioners' contention that a justiciable controversy was presented by their claim that inspection of the Committee's bank account records by the FBI without any summons, subpoena or court order or any advance notice was an invasion of petitioners' freedom of association and right of privacy protected by the First, Fourth and Ninth Amendments.

To support this conclusion the court below erroneously relied upon this Court's decision in *Donaldson* v. *United States*, 400 U.S. 517 (1970) and its own conclusion in *Application of Cole*, 342 F.2d 5 (2d Cir.), *cert. denied*, 381 U.S.

950 (1965). As Justice Blackmun pointed out in his opinion for the Court in *Donaldson*, a person's standing to challenge a government inspection of records in the hands of third parties depends upon his demonstrating "a significantly protectable interest" [400 U.S. at 531] in the record information.

In *Donaldson* and *Cole* no such interest was demonstrated. But in cases where the government has sought to obtain information about a political organization by inspecting their bank records, the organization's First Amendment interest in protecting the information is manifest. This distinction was recognized by Mr. Justice Blackmun himself, before his appointment to this Court, in *Pollard* v. *Roberts*, 283 F. Supp. 248 (E.D. Ark.) (three-judge court), *aff'd per curiam*, 393 U.S. 14 (1968), in which government subpoenas of the bank records of the Republican Party in Arkansas were invalidated on First Amendment grounds. See also *United States Servicemen's Fund* v. *Eastland*, —— F.2d ——, No. 71-1609 (D.C. Cir. Aug. 30, 1973). Cf. *Stark* v. *Connally*, 347 F. Supp. 1242 (N.D. Calif. 1972) (three-judge court), prob. juris. noted *sub nom. Stark* v. *Shultz*, 42 L.W. 3194 (1973).

The reasoning underlying the First Amendment standing of a political group like the petitioners in this case to challenge a governmental inspection of their bank records rests upon the fundamental rights of citizens not to be compelled to disclose their identities and political affiliations.* As the D.C. Circuit recently stated in its decision in *United States Servicemen's Fund* v. *Eastland, supra*:

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* In his dissent below, Judge Oakes wrote:

"To gather the names of the authorized signatories, however, is no different from ascertaining membership (or leadership) in a 'group espous[ing] dissident beliefs' struck down in

"If the forced disclosure of the information concerning contributors to and membership in the appellant association violates its First Amendment rights, then it is too clearly an aggrieved person when a third person is under compulsion by the defendants to disclose this information to warrant discussion . . .

• • •

"The right of voluntary associations, especially those engaged in activities which may not meet with popular favor, to be free from having either state or federal officials expose their affiliation and membership absent a compelling state or federal purpose has been made clear a number of times. *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *Bates* v. *Little Rock*, 361 U.S. 516 (1960); *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293 (1961); *Gibson* v. *Florida Legislative Committee*, 372 U.S. 539 (1962); *Pollard* v. *Roberts*, 393 U.S. 14 (1968), affirming the judgment of the three judge district court for the district of Arkansas, 283 F. Supp. 248" Slip. Op. at 17, 23.

Bates, Patterson and *Gremillion, supra.* If there were dissemination of such a list beyond the FBI, which we do not know (although we do know that the names remain in the FBI files), so much the worse. It is no answer to my mind to suggest as the majority seems to imply that the Committee wanted to publicize its program in the press and through flyers and leaflets or 'to make visible' public opposition to the war; publicizing the Committee's efforts and involuntarily listing the members are two different things. Cf. *United States* v. *National Committee for Impeachment, supra.* Nor is it any answer to say that this is a very small infringement or a very little interference with constitutional guarantees. As I have said in another context, '[e]ven a very little chill on a very big right is too much.' *Cortright* v. *Resor, supra*, 447 F.2d at 258 (dissenting opinion)." 480 F.2d at 335-6.

Moreover, even those cases not involving First Amendment rights which have followed *Cole*, and have held that depositors have no standing to assert constitutional defenses, have turned on the presence of the following factors completely absent in this case: (1) the government agency was following established procedures for obtaining such records by means of judicial or administrative summons, subpoena or warrant, and (2) the government agency was seeking records claimed to be relevant and material to a possible violation of law turn under inquiry. See, e.g., *United States* v. *Couch*, —— U.S. ——, 41 LW 4107 (Jan. 9, 1973); *Dosek* v. *United States*, 405 F.2d 405 (8th Cir. 1968); *Galbraith* v. *United States*, 387 F.2d 617 (10th Cir. 1968).

The importance of these factors as minimal Fourth Amendment requirements was underscored by the recent decision in *Stark* v. *Connally, supra.* There, several bank depositors challenged the constitutionality of the Bank Secrecy Act, 12 U.S.C. §1829(b) and 31 U.S.C. 1051-1122, requiring banks and similar financial institutions to keep certain records and authorizing the Secretary of the Treasury to require such institutions and parties participating in transactions with such institutions to report financial transactions, without any form of judicial or administrative summons, subpoena or warrant.

The three-judge Court in *Stark* held that since the reporting provisions for domestic financial transactions contained no procedural safeguards, such as a summons or search warrant, they constituted an impermissible invasion of a

citizen's right to privacy and an unreasonable search in violation of Fourth Amendment.*

The search of petitioners' bank records, without warrant or subpoena, yielded the identity of individuals associated with the petitioner Committee in exactly the same fashion as a seizure of the Committee's membership list. Unless certiorari is granted on this issue, the FBI and other government agents will be able to accomplish indirectly that which this Court has specifically forbidden the government from doing, i.e., compel the disclosure of membership lists.

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* It is worth noting that the Government's brief in *Stark* was quoted in the court's opinion as follows:

> " 'Nothing in the statute gives the government any greater right to *access* to bank records than it possessed before. Consequently, whenever the federal government desires to inspect any bank records kept under the provisions of the new statute, the federal government *must resort to using an administrative summons or judicial subpoena as it did in the past.* Upon the issuance of such a summons or subpoena, if the bank customer felt that the use of the summons or subpoena constituted an illegal search and seizure under the Fourth Amendment, that contention could be contested in court in the same manner as it heretofore has been contested' " (Court's emphasis). 347 F. Supp. at 1251.

Thus, the FBI Special Agent in this case did precisely what the Government in *Stark* asserted it was powerless to do under existing law, i.e., obtained information from bank records without summons or subpoena.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A
Opinion of the Court

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Opinion of the Court

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 546—September Term, 1972.

(Argued March 14, 1973 Decided June 12, 1973.)

Docket No. 72-1439

THE FIFTH AVENUE PEACE PARADE COMMITTEE, an unincorporated association, and DEBORAH D. WEISBURD and ROBERT H. SILK, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

—against—

L. PATRICK GRAY 3rd, Acting Director of the Federal Bureau of Investigation, JOHN F. MALONE, an Assistant Director in Charge of the Federal Bureau of Investigation in New York City, and THE AMALGAMATED BANK OF NEW YORK,

Defendants-Appellees.

Before:

HAYS, MULLIGAN and OAKES,

Circuit Judges.

Appeal from a judgment entered after a non-jury trial in the United States District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge*, dismissing plaintiffs' complaint alleging, *inter alia*, that an an FBI investigation conducted just prior to the Novem-

ber, 1969 Moratorium Demonstration has a chilling effect upon the exercise of their constitutional rights.

Affirmed.

ARTHUR M. HANDLER, New York, N.Y. (Donald D. Shack, Richard M. Resnik, Barry H. Mandel, New York, N.Y., and Burt Neuborne, New York Civil Liberties Union, New York, N.Y., of Counsel), *for Plaintiffs-Appellants.*

DANIEL RIESEL, Assistant United States Attorney, New York N.Y., (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, and Dennison Young, Jr., Assistant United States Attorney, New York, N.Y., of Counsel), *for Defendants-Appellees Gray and Malone.*

ALAN G. BLUMBERG, New York, N.Y. (Szold, Brandwen, Meyers & Altman, New York, N.Y., of Counsel), *for Defendant-Appellee Amalgamated Bank.*

MULLIGAN, *Circuit Judge:*

This is an appeal by the Fifth Avenue Peace Parade Committee, Deborah D. Weisburd and Robert H. Silk, from a judgment of the United States District Court for the Southern District of New York, entered on February 16, 1972, after a non-jury trial before Hon. Harold R. Tyler, Jr., dismissing their complaint on the merits. Essentially plaintiffs complained that an FBI investigation conducted immediately prior to the November 14-16, 1969 Moratorium Demonstration in Washington, D.C. and the dissemination of the FBI reports of this investigation to various other

Government agencies, has and will continue to have a chilling effect upon the exercise of their constitutional rights and further constituted an illegal search and an invasion of privacy. Judge Tyler dictated his findings of fact and conclusions of law into the record at the conclusion of the trial. We affirm.

The Fifth Avenue Peace Parade Committee functioned as an umbrella organization for some one to two hundred anti-war groups in the New York metropolitan area. Its purpose was to organize meetings and demonstrations protesting the American military involvement in Southeast Asia. The Committee publicized its program widely in the press and through the distribution of flyers and leaflets. The work of the Committee was supported by contributions generally in the range of $1 to $10.

The Committee was deeply involved in the preparations for the November, 1969 Moratorium Demonstration in Washington, the purpose of which, as explained by the Committee's Coordinator, Norma Becker, was "to make visible . . . public opposition to the war in Vietnam and to dramatize public desire for withdrawal of American troops from Vietnam." Several hundred "marshals" were recruited and trained to keep the demonstration safe and orderly. To provide transportation to Washington, the Committee hired some six hundred buses and three or four trains, and sold tickets to members of its various affiliated organizations and to the general public. The receipts from the ticket sales were deposited in a special account with the defendant Amalgamated Bank of New York (the "Washington Transportation Fund").

In Washington another "umbrella" organization, the New Mobilization Committee, with which the Fifth Avenue Peace Parade Committee was affiliated, was conferring with Government officials about the logistics for the planned demonstration. The New Mobilization Committee

attempted to keep the Government accurately apprised of the number of people expected to participate in the demonstration. It did this by soliciting frequent reports of the number of buses and trains chartered by the various anti-war organizations around the country. As might be expected the preliminary estimates continuously varied and eventually proved somewhat inaccurate.[1]

The Washington Headquarters of the FBI initiated its own investigation, the purpose of which according to the Special Agent in charge, Philip H. Wilson, was "to know who was coming, how many were coming, mode of transportation, arrival, when they expected to leave Washington, any individuals that had a potential record of violence, or who might threaten the President's life, or a Cabinet member, or anything of that nature." The Bureau's New York office was directed to determine the size, nature and scope of the local Moratorium activities. Special Agent Robert Casper, the coordinator of this local investigation, assigned Agent Constantino to check the Washington Transportation Fund account to get an early estimation of how many buses and trains could possibly be hired by the Committee. On November 6, Constantino visited the defendant Amalgamated Bank and was allowed to inspect the Fund's new account sheet and signature cards and was advised the account's opening balance. Although he did not request it, Constantino was orally given similar information about an account opened by the "Labor Committee to Support Washington Action" whose coordinator, Deborah D. Weisburd, is a named plaintiff in this class action.

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1 The counsel to the New Mobilization Committee testified that just prior to the Moratorium weekend he told the Government personnel that his reports indicated some 250,000 people were expected to participate. At trial he estimated that between 500,000 and 750,000 were present on Saturday, November 15. Undoubtedly part of this discrepancy was due to the fact that not all demonstrators chose to use the transportation facilities provided by the various anti-war organizations.

Agent Constantino reported orally to his supervisor, Casper, that he had located the account, the amount of money it contained and the names of the individuals listed on the signature cards. The District Judge found that Constantino's information was transmitted to the FBI's Washington Headquarters. Constantino subsequently dictated a report of his findings on November 13; this report was transcribed on an FD-302 form on November 19.[2] No agent attempted to examine or to copy any checks deposited in the Washington Transportation Fund's account nor was any attempt made to compile a list of the checks' drawers.

Casper had also assigned Agent Albert Faller to find out the number of buses reserved by the Fifth Avenue Peace Parade Committee and their departure points. Faller's only inquiry was to the Allied Bus Company which gave him this information. On the morning of November 15, some fifty-six agents observed the bus departures, from 57 locations in New York City. Their "surveillance" consisted in counting the buses and the passengers leaving the city. The FBI made no attempt to photograph or to compile a list of the passengers. The information provided by the agents was immediately forwarded to Agent Wilson in Washington. Prior to and during the demonstration, the FBI's Washington office disseminated the information its agents had gathered to various local and Federal governmental agencies in the Washington area.[3] The Bureau's

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2 The FD-302 contained the names of the officers of the Peace Parade Committee and of the Labor Committee to Support Washington Action who were authorized to sign checks for their respective organization's account. The opening balance of each account was also listed. Both accounts were opened on October 29, 1969—a few weeks before the Moratorium Demonstration.

3 The following agencies received information from FBI Headquarters prior to and during the demonstration: the Department of Justice, whose Attorney General oversees preparations for potential civil dis-

New York office maintained a file for all the information it had collected on the Moratorium. In January 1970, a classified 200 page summary of that voluminous file was prepared and subsequently disseminated to various governmental agencies.[4]

Plaintiffs learned of Agent Constantino's visit to the Amalgamated Bank sometime *after* the Moratorium Demonstration when an official of the Allied Bus Company, who was attempting to have one of the Committee's checks certified, was told that the FBI had investigated the Washington Transportation Fund account. He relayed this information to the Secretary of the Fifth Avenue Peace Parade Committee and its attorneys. These facts, in turn, were transmitted to various individuals who were involved in the Moratorium activities. On June 22, 1970 plaintiffs commenced this litigation by filing a complaint alleging, upon information and belief, that the FBI had examined and photocopied the bank records of the Washington Transportation Fund as well as checks deposited in that account;

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turbances; the D.C. Metropolitan Police, who were charged with controlling traffic; Police Departments in various counties surrounding Washington, through whose jurisdictions the demonstrators were expected to pass; the Army's 116th Military Intelligence Group, whose responsibility is to keep order during civil disturbances; the United States Secret Service, whose responsibility is to protect the President and the White House; the United States Park Service, which is charged with protecting parks and streets; the General Services Administration which has a general responsibility to protect Government buildings; the State Department which has been the target of previous demonstrations and which has its own security force; the Navy and Air Force which protect their own installations and recruiting stations, and the Internal Revenue Service whose Security Division had inquired whether the Service would be a target of the demonstrators.

4 The summary report was disseminated by FBI Headquarters to the Secret Service, the Department of Justice, the Internal Revenue Service and the Office of Special Investigation of the Air Force. The Bureau's New York office further disseminated the report to the Secret Service in New York City, the 108th Military Intelligence Group and the Naval Investigative Service in New York City.

had compiled a list of persons who had paid for their transportation tickets by check; had examined and copied the records of the Allied Bus Company and had also learned the departure points of the buses from the New York area and photographed passengers as they boarded the buses. Finally they alleged that the FBI had these data, photocopies and photographs in its possession. By stipulation in the pre-trial order, the parties agreed to try the question of whether the dissemination of the information was justified in view of the purpose of the investigation, and the complaint was deemed so amended. See Fed. R. Civ. P. 15(b). Plaintiffs claimed that these actions by the Bureau (aided and abetted by the Amalgamated Bank) were an invasion of their constitutional right of privacy and constituted an unlawful search and seizure. They further claimed that these "acts . . . has [*sic*] and will restrict and inhibit the Individual Plaintiffs and the members of the Class from the lawful exercise of such rights, has and will place them in fear of repression and retaliatory acts by agencies of the United States Government and has and will intimidate, harass and have a chilling effect upon the Individual Plaintiffs and the members of the Class in the lawful exercise of such rights." Plaintiffs sought both a declaration that the defendants' conduct violated their constitutional rights, and an injunction directing the defendants to surrender or to destroy the data, photocopies and photographs allegedly obtained by the Bureau and enjoining the defendants from using these items "in any manner whatever." Plaintiffs promptly called a press conference to announce the suit and reports of the litigation were contained in the *New York Times* and eventually in the *New York Post*. Judge Tyler subsequently granted plaintiffs' motion to allow the suit to proceed as

a class action.[5] After a five day trial in the middle of January and one day in February, Judge Tyler dismissed the complaint on the merits.

The plaintiffs' position both at trial and on this appeal is that the FBI's investigation was overbroad, unauthorized and illegal and that the dissemination of the information it had collected was unlawful. They further complain, *inter alia*, that the trial judge improperly refused to let them depose Agent John Malone of the FBI and to inspect either the previously mentioned file compiled by the Bureau's New York office or the classified summary subsequently prepared.

We believe that this case is governed by *Laird* v. *Tatum*, 408 U.S. 1 (1972),[6] and accordingly we affirm the judgment below on the ground that plaintiffs failed to present a justiciable controversy. In *Tatum*, the several plaintiffs, four individuals and nine unincorporated associations, sued on their own behalf and on behalf of all other individuals

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5 Judge Tyler originally defined the class as

> All persons who purchased "Moratorium Day" tickets (as described in the complaint) and paid for same with their personal checks upon which their names and addresses were imprinted, and which checks were deposited in the so called "Washington Transportation Fund" account maintained at the Amalgamated Bank of New York.

Plaintiffs Weisburd and Silk had purchased their transportation tickets with personal checks deposited in the Washington Transportation Fund account. Pursuant to Fed. R. Civ. P. 23 Judge Tyler subsequently redefined the class to include all individuals who were acting on behalf of the Fifth Avenue Peace Parade Committee or any of its affiliated organizations.

In an opinion reported at 327 F. Supp. 238 (S.D.N.Y. 1971), Judge Tyler ruled, *inter alia*, that the claimed deprivations of constitutional rights satisfied the amount in controversy requirement of 28 U.S.C. § 1331(a). In view of our disposition of this case, we need not pass on that issue. See *Aguayo* v. *Richardson*, 473 F.2d 1090, 1101-02 (2d Cir. 1973).

6 The *Tatum* decision was announced on June 26, 1972, over four months *after* Judge Tyler directed entry of judgment dismissing the complaint on the merits.

and organizations who wish to exercise their First Amendment rights "without fear of harassment, intimidation and injury resulting from investigation, surveillance and record keeping by military authority." (Plaintiffs' Complaint ¶ 5, *Laird* v. *Tatum*, 408 U.S. 1 (1972)). The complaint alleged that the intelligence agencies of the United States Armed Forces were continually engaged in the surveillance of lawful and peaceful civilian activity, that the information collected concerning the plaintiffs served no legitimate military purpose, was widely and indiscriminately disseminated[7] and was stored in computerized data banks. It further alleged that a "blacklist" of potential troublemakers had been compiled. The plaintiffs claimed that the defendants' activities inhibited and curtailed their free exercise of First Amendment rights and deprived them of their constitutionally guaranteed right of privacy. Since the Supreme Court was reviewing a motion to dismiss on the pleadings, the allegations of the complaint and of the supporting affidavits had to be accepted as true. *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167, 172 (1967); see 5 C. Wright & A. Miller, Federal Practice and Procedure § 1363 (1969).

The Court rejected the plaintiffs' claim that the intelligence activities had a "chilling effect" upon the exercise of

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7 The *Tatum* plaintiffs alleged:

> The information collected by the defendants' agents is regularly, widely and indiscriminately circulated via military teletype maintained by defendants. This network provides every major Army troop command in the continental United States and military headquarters in Europe, Alaska, Hawaii and Panama with daily and weekly reports on virtually all political protest occurring anywhere within the United States.

They further alleged:

> Defendants plan to make the information contained in the data bank, mentioned in the preceding paragraph, available to numerous federal and state agencies upon request.
>
> (Plaintiffs' Complaint ¶¶ 9 & 13, *Laird* v. *Tatum*, *supra*.)

their First Amendment rights, for they were unable to point to any resulting direct injury or immediate threat of harm. "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; 'the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.' *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89 (1947)." *Laird* v. *Tatum, supra*, 408 U.S. at 13-14.

Appellants seek to distinguish *Tatum* but we are not persuaded that the proffered distinctions do anything more than establish that their case is considerably weaker than that of the plaintiffs in *Tatum*. Appellants here urge that in *Tatum* there was a general challenge to an existing system of military surveillance of civilian activities which created a chilling and inhibiting effect on the full expression of First Amendment rights. In the case at hand they claim that the intrusion was specific since it related to particular acts of specific Government agents. We fail to see what solace appellants find in making the distinction. The ongoing and pervasive military surveillance of civilian activity alleged in *Tatum* would seemingly create a more understandable apprehension of inhibition of First Amendment rights, than the *ad hoc* response of a civilian agency here to a major and massive demonstration in Washington, D.C. The historic revulsion of the American civilian for military intrusion in fact was a principal theme of Mr. Justice Douglas's dissent in *Tatum*.

The danger of injury to person and property here was not only obvious to the Attorney General who the District Court judicially noticed, had the responsibility for coordinating Federal Government activities relating to civil disturbances and who relied principally upon the FBI, but it was also fully comprehended by the New Mobilization Committee which was exchanging information on a regular

basis with the Department of Justice. The Committee moreover was in the process of recruiting and training 500 to 600 "marshals" to maintain safety and to avoid confrontations created by "hot-headed elements within the ranks of demonstrators . . . ."

Beyond any reasonable doubt the FBI had a legitimate interest in and responsibility for the maintenance of public safety and order during the gigantic demonstration planned for Washington, D.C. In fact, had it been ignored the agency would be properly chargeable with neglect of duty. The suggestion that since the Committee was supplying the Department of Justice with information, total reliance should have been placed on it and law enforcement agencies should be content to sit back and only react to actual violence, is not persuasive. Cf. *Anderson* v. *Sills*, 56 N.J. 210, 265 A.2d 678, 684-85 (1970). No matter how peaceful the intent of its organizers, the assemblage of the vast throng planning to protest the Vietnamese action and to express their sincere and conscientious outrage, presented an obvious potential for violence and the reaction of the Government was entirely justifiable. That reaction was not to deter, not to crush constitutional liberties but to assure and to facilitate that expression and to minimize catastrophe which in the end would harm the cause of the plaintiffs more than the disruption or violence would injure the Nation. Hence we reject the argument that the specific intelligence operation complained of, presents a legal distinction from *Tatum* which benefits the appellants here. Our conclusion is to the contrary.

In *Tatum* as we have indicated, the Court found mere speculative apprehension of future misuse of information and hence no objective harm and no justiciable issue. This case is no different. There is no showing of any misuse of information and the plaintiffs' allegations on informa-

tion and belief with respect to photographs, check duplication and list compilation were not established and in fact disproved. The shivering here was self-induced. See *Laird* v. *Tatum, supra,* 408 U.S. at 13-14; *Finley* v. *Hampton,* 473 F.2d 180 (D.C. Cir. 1972); *Donohoe* v. *Duling,* 465 F.2d 196, 201-02 (4th Cir. 1972); compare *Handschu* v. *Special Serv. Div.,* 349 F. Supp. 766 (S.D.N.Y. 1972).[8] The specific activity of Agent Constantino by no means rose to the level of a constitutional invasion of privacy. "Thus far only the most intimate phases of personal life have been held to be thus constitutionally protected." *Rosenberg* v. *Martin, slip op.* 3125, 3131 (2d Cir., April 27, 1973). Nor do the appellants have a right to complain about the defendant bank's voluntarily surrendering its own limited records to a government agency. See *Donaldson* v. *United States,* 400 U.S. 517 (1971); *Application of Cole,* 342 F.2d 5 (2d Cir.), cert. denied, 381 U.S. 950 (1965). Since the plaintiffs admittedly represented a broad political spectrum united only in a vigorous opposition to American troops in Vietnam, it is indeed difficult to imagine in the light of subsequent historic events, what misuse intelligence agencies might possibly make of whatever data was collected which might harm the plaintiffs.

The appellants argue further that in *Tatum* the Army intelligence network gleaned its information principally from public sources in contrast to the specific examination of bank records by Agent Constantino. Actually, the eleven volume collection here summarized in 200 pages, could not have been based on Constantino's meager con-

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8 Cases such as *Hentoff* v. *Ichord,* 318 F. Supp. 1175 (D.D.C. 1970), involving threats to generally publicize the information gathered, are not germane to the present case. As plaintiffs' unsuccessful efforts to secure access to the FBI files indicate, the Bureau does not intend to make the information available for public inspection.

tribution. The Moratorium Demonstration was not clandestine, its very success depended upon the widest possible publicity. Bus departure points and availability of rail and other transportation facilities were broadly publicized and anonymity was never sought by its sponsors. The concern of the FBI was with numbers and transportation and the Bank inquiry was clearly related to that concern. The financial ability to charter buses to transport thousands of demonstrators was germane if any realistic appraisal of manpower was to be made. The argument that the FBI only ascertained the initial financial support of the group and that this information was not helpful or pertinent to make this estimate only emphasizes how minor the intrusion in fact was.

The argument is raised that there was no improper use of the data collected in *Tatum* but that there was widespread dissemination of the information collected here. This is not the fact. As previously noted, the *Tatum* plaintiffs alleged widespread dissemination, and Mr. Justice Douglas stated in his dissenting opinion: "the intelligence reports were regularly and widely circulated and were exchanged with reports of the FBI, state and municipal police departments, and the CIA." *Laird* v. *Tatum*, *supra*, 408 U.S. at 26; see *ACLU* v. *Laird*, 463 F.2d 499, 502 (7th Cir. 1972), cert. denied, 41 U.S.L.W. 3376 (U.S. Jan. 8, 1973).

While the argument is made that the Army destroyed its records in the *Tatum* case, there was no showing there that its distributees followed a similar course. The distribution here (see footnotes 3 and 4 *supra*) was appropriate in view of the responsibility of the various official agencies made privy to the reports. The only question raised as to the propriety of distribution is the inclusion of "Internal Revenue Service" which conjures up the spectre of tax audits and investigations. In fact there

has been no claim that in the almost four years since the investigation there has been any taxpayer harassment or threat thereof. Moreover the concern of the demonstrators for the expenditure of tax revenues to support the military presence in Vietnam, justified the fear of IRS that its facilities in Washington would be a natural target of the wrath of those assembled.

In sum, although the plaintiffs here have singled out a particular and specific investigative incident, they have, as the court below found, failed to establish any specific harm, real or threatened. In our view they have failed to present a justiciable controversy and under *Tatum* we find no jurisdiction in the federal courts to entertain their action.

Neither do we find any reason to hold that Judge Tyler abused his discretion in limiting plaintiffs' discovery. "It is the unusual and exceptional case where the determination of the trial court (in discovery of Government documents) is set aside." *Brown* v. *Thompson*, 430 F.2d 1214, 1216 (5th Cir. 1970); *Swanner* v. *United States*, 406 F.2d 716 (5th Cir. 1969). In a declaratory judgment action, "the complaint must stand or fall on its own merits and cannot be used as a vehicle for searching out and discovering a right of action." 5 C. Wright & A. Miller, Federal Practice and Procedure § 1238, at 204 (1969) (footnote omitted); *Laird* v. *Tatum*, *supra*, 408 U.S. at 14.

Affirmed.

OAKES, *Circuit Judge* (dissenting):

There has been detected a tendency in recent times to justify invasion of constitutional rights on the basis of national security. *See Sullivan* v. *Murphy*, 41 U.S.L.W. 2598 (D.C. Cir., Apr. 16, 1973) (participants and bystanders arrested in 1972 Washington May Day demonstration

entitled to order expunging or restricting use of arrest records compiled during unlawful detention). The tendency has not been wholly recent, of course. *See generally Developments in the Law—The National Security Interest and Civil Liberties*, 85 Harv. L. Rev. 1130, 1133 (1972). Big Government has commenced from time to time with the objective of protecting the public's security but in the process has infringed upon or invaded or jeopardized the only real security of the individual, the security provided by the Bill of Rights. Listed in the Great Bill as belonging to the public is "the righ[t] to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . . ," under the express terms of the fourth amendment; implied is a "guarantee of certain areas or zones of privacy" under the first, or the fourth and fifth, or the ninth amendments, or the "penumbra" of the Bill of Rights. *See Roe* v. *Wade*, 41 U.S.L.W. 4213, 4225 (U.S., Jan. 22, 1973). Included also among these precious rights of the "people" which have been threatened from time to time historically by ill-advised or, occasionally perhaps, malevolent governmental officials in the purported interests of "security" are rights set forth in the first amendment, not just of "the freedom of speech" but also the "right . . . peaceably to assemble, and to petition the Government for a redress of grievances." From these rights expressly protected has been wisely and necessarily implied a right to freedom in political associations. *See, e.g., Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293 (1961); *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960). These are the rights surrounding the basic freedom of thought, which carries with it in a democracy the right to protest the conduct of Government. That right of protest is one which has had some of its greatest challenges in the recent span of years during which this country has been involved in the most unpopular war of its history. *See*

New York Times Co. v. *United States*, 403 U.S. 713, 717 (1971) (opinion of Black, *J.*). *See also United States* v. *National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972); *Cortright* v. *Resor*, 447 F.2d 245, 255 (2d Cir. 1971) (dissenting opinion), *cert. denied sub nom. Cortright* v. *Froehlke*, 405 U.S. 965 (1972).

In the light of the above, I start with the premise—and I suspect the majority would not disagree with the premise, though the majority opinion commences at the other end of the rights-security spectrum—that a group, even a huge group, of people who want to go to the seat of government to protest a war and who do so peaceably have the right not to have their name (and hence their views against the administration or the Congress or the courts or the policies of any in relation to the war) listed in some dossier or table or catalog of protesters and disseminated throughout all the major branches of the "security system" of the United States. To this end, subsidiarily, they also have the right—or individual members of the group have the right—not to have their personal "papers, and effects" unreasonably searched or examined.

More specifically, there is a constitutional guarantee absent some compelling state interest against compulsory disclosure of membership in or affiliation with a group—particularly a dissident group—that is exercising first amendment freedoms. As Mr. Justice Stewart said for the Court in *Bates* v. *City of Little Rock, supra*, 361 U.S. at 523, "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle government interference." As Mr. Justice Harlan said for the Court in *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958):

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy

> may constitute [an] effective . . . restraint on freedom of association. . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.

Bates, Patterson and *Louisiana ex rel. Gremillion* v. *NAACP, supra,* are the staunchest of authorities for the right of the members of the Fifth Avenue Peace Parade Committee to have remained anonymous and not to have had—for whatever purposes Big Government might wish to make further use of them—their names listed and kept in "security" agency files.

II.

At the other end of what I have called the rights-security spectrum is the duty of law enforcement agencies in the United States to make certain that the persons of government officials and the property of Government are protected against violence in any form. *See Anderson* v. *Sills,* 56 N.J. 510, 265 A.2d 678, 689 (1970). In this respect I agree wholly with the majority view that "Beyond any reasonable doubt the FBI had a legitimate interest in and responsibility for the maintenance of public safety and order during the gigantic demonstration planned for Washington, D. C." I also agree completely with the Special Agent in charge, Phillip H. Wilson, that that duty included the duty "to know who was coming, how many were coming, mode of transportation, arrival, when they expected to leave Washington, any individuals that had a potential record of violence, or who might threaten

the President's life, or a Cabinet member, or anything of that nature." In this respect the Bureau here was acting properly in attempting to determine the size, nature and scope of New York Moratorium activities and in attempting to obtain an estimate of the number of buses and trains that the Peace Parade Committee could hire. The Bureau was acting perfectly properly in observing the bus departures, counting the buses and the passengers leaving the city of New York, as well, of course, in making inquiry of the Allied Bus Company.

The court below found and, while there was a considerable absence of discovery below, I have no reason to doubt found properly, that the FBI made no attempt (A) to photograph the departing passengers; (B) to compile a list of the departing passengers; (C) to examine any checks deposited in the account of the "Washington Transportation Fund"; or (D) to compile a list of the persons who signed checks payable to that fund.

While the case would have been different if movies had been taken of the departing protesters, or if lists of passengers or contributors had been compiled, the FBI's overall "surveillance" of the Moratorium activities in New York was perfectly proper and a legitimate exercise of governmental duty to ascertain how big the demonstration was likely to be and to observe whether there were any indications that violence might be in the offing. The fact of the surveillance, thus limited in methodology, was no infringement of rights.

III.

Thus this case boils down to two questions. The first is whether the listing by the agent who talked to the bank of the names of the individuals listed on the signature cards for the Washington Transportation Fund was improper,

particularly if it was subsequently disseminated to other governmental agencies, including the IRS. The second question is whether the subsequent dissemination by the FBI of a summary of its huge investigation to other agencies of government, including the IRS, operated as an infringement of protected rights. I answer both questions in the affirmative.

Concerning the first question, it is totally immaterial to the ascertainment of the number of protesters going to Washington to know or list the names of the people authorized to sign checks on the Washington Transportation Fund. In my view, it was perfectly proper for the FBI to inquire of the bank the amount of money in that account, since this was relevant to the number of buses that might be expected to be hired. To gather the names of the authorized signatories, however, is no different from ascertaining membership (or leadership) in a "group espous[ing] dissident beliefs" struck down in *Bates*, *Patterson* and *Gremillion*, *supra*. If there were dissemination of such a list beyond the FBI, which we do not know (although we do know that the names remain in the FBI files), so much the worse. It is no answer to my mind to suggest as the majority seems to imply that the Committee wanted to publicize its program in the press and through flyers and leaflets or "to make visible" public opposition to the war; publicizing the Committee's efforts and involuntarily listing the members are two different things. *Cf. United States* v. *National Committee for Impeachment*, *supra*. Nor is it any answer to say that this is a very small infringement or a very little interference with constitutional guarantees. As I have said in another context, "[e]ven a very little chill on a very big right is too much." *Cortright* v. *Resor*, *supra*, 447 F.2d at 258 (dissenting opinion).

Concerning the second or dissemination question, the demonstration having ended peaceably, the protesters having gone home, the persons of government officials and the property of the Government having been secured, I can see no earthly reason why it was necessary for the FBI to disseminate its summary report to the IRS and assorted other intelligence agencies of the Government. It is said that this was done as "routine." That may be so, but then it seems to me that the "routine" should be changed by order of the court, at least to the extent that the summary report included names of peaceable individuals involved in the demonstration; name listing was unnecessary to what is supposedly a routine intelligence report from one law enforcement agency of Government to another on how a given demonstration was handled. I would except from this, of course, any names of persons who engaged in or were thought to have engaged in any violence whatsoever. I include within it, however, the names of any persons who confined their Moratorium activity to the peaceful exercise of the constitutional rights above set forth. To the extent that the summary report sets forth the names of peaceable demonstrators, I would require that they be expunged. While the war in Vietnam is over, and some might suggest that this whole case is therefore moot, bombing in Southeast Asia proceeds and it may be yet that there will be another demonstration against governmental participation. The injunction that I would require be issued would prevent the infringement of constitutional rights in such event.

IV.

On the issue of justiciability, I distinguish *Laird* v. *Tatum*, 408 U.S. 1 (1972), on the basis that the majority opinion there construed the complaint narrowly as containing no allegations of any specific misuse of data

gathered by the Army Intelligence network, irrespective of the statements in the dissent to *Tatum* or how another court might have construed the allegations of the complaint. I cannot believe that *Tatum* validated clandestine electronic or photographic surveillance, *see Donohoe* v. *Duling*, 465 F.2d 196, 201 (4th Cir. 1972); rather I think the holding was "narrow[ly]" limited to general surveillance without specific misuse of data. *See Handschu* v. *Special Services Division*, 349 F. Supp. 766, 769 (S.D.N.Y. 1972) (Weinfeld, *J.*). *See also The Supreme Court, 1971 Term*, 86 Harv. L. Rev. 1, 131 (1972). *Cf. United States* v. *United States District Court*, 407 U.S. 297 (1972) (warrantless domestic security wiretap unlawful). Moreover, in the light of recent reports of Watergate-allied events, and the Senate Report, S. Rep. No. 524, 92d Cong., 2d Sess. (1972), by Senator Ervin's Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, indicating that the *Tatum* majority seriously underestimated the size and scope of Army intelligence activities which included gathering public and private information on hundreds of thousands of "politically suspect" persons, one wonders also whether the *Tatum* case might not be qualified today. Thus I would decide the question of justiciability in the plaintiffs' favor and also would give them standing. *See National Student Association* v. *Hershey*, 412 F.2d 1103, 1115 (D.C. Cir. 1969); 83 Harv. L. Rev. 935, 938-39 (1970). The district judge has inspected the FBI's "summary report" in camera and himself found nothing in it, with one exception, that demonstrates any underlying need for secrecy in respect to it. I would therefore order its disclosure on the basis that it does not come within the "investigatory files" exception to the Freedom of Information Act, 5 U.S.C. § 662, *Frankel* v. *SEC*, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889

(1972), because here it is the governmental agency itself which is challenged as having engaged in unlawful conduct, and there is probable cause to believe that at least to a slight extent it did so.

I accordingly dissent.

APPENDIX B

District Court's Findings of Fact and Conclusions of Law

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court: We have had a trial of this case now on the days of January 17, 18 and 21st, and February 3, 1972.

I start out by noting preliminarily that this is a case in which, having heard the evidence, I am constrained to observe that there are no questions of credibility or, to put it in blunt language, any questions of witnesses who gave untruthful testimony or attempted to obfuscate the facts that they were asked to tell us about. I want to strip the issues of credibility out of the case because, No. 1, it is fair, and No. 2, because I think it helps us to get down to the general issues here which are largely a matter of law.

Prior to the commencement of the trial there was considerable activity in the pretrial sense, but as a result of that, counsel made a good faith effort to sit down and reduce a number of facts to stipulation.

For this added reason the facts here can be said to be in no real serious dispute at all.

The parties in this case deserve some identification because, at least as far as the Judge was concerned, he learned some things about the plaintiffs which he never really understood until the trial itself.

The Fifth Avenue Peace Parade Committee, which is an unincorporated association, is a group made up of a

number of subgroups. As a matter of fact, it does not have any individual dues paying members as such.

As I understood the testimony of Norma Becker, who was an active committee member in that organization, basically Fifth Avenue Peace Parade exists for the purpose of coordinating the efforts of a number of groups who were interested in participating, demonstrating, expressing and disseminating views generally speaking in opposition to the United States involvement in the war in Southeast Asia.

The organization supported itself in large measure by contributions, solicited and unsolicited.

The individual plaintiffs, Deborah Weisburd and Robert H. Silk, are persons who, in one way or another, purchased tickets to take the bus trip from New York City to Washington, D.C., to participate in the moratorium day activities held in the District of Columbia on November 14th, 15th and 16th, 1969.

As the proof turned out, however, I think everybody agreed that the critical day and the important day of that activity was Saturday, November 15th, 1969.

Of course the defendants, Mr. J. Edgar Hoover as the director of the Federal Bureau of Investigation, and John F. Malone, the assistant director in charge of the New York City office of the Bureau, which office, incidentally, includes some sub-offices, most particularly for our purposes the sub-office in White Plains, New York, some time in September, 1969, various agencies and, at least one or more private groups in the District of Columbia and, indeed, in other cities, started to prepare for the November 15th activities in the district.

At that time the FBI, acting generally pursuant to the provisions of its statute, which is known to lawyers as 28 USC, Section 533, decided to set up a coordinating group under the leadership of Special Agent Phillip Wilson.

At the same time the District of Columbia Metropolitan Police, the park police, and the Department of Justice began to concern themselves about gathering intelligence and making special preparations for the onset of the crowds which were expected.

A non-governmental group, which played a very important role in all this, was what came to be known as the New Mobilization Committee. We heard from one representative of that committee as to their activities.

This New Mobilization Group or Committee, as it was known, though non-legal and non-official in makeup, was nevertheless openly received and, indeed, welcomed by government officials and agencies, and was looked to for certain information from time to time, particularly for the purpose of learning, as the New Mobilization Group was also interested in learning for its own reasons, the approximate number of people to come to the moratorium day activities and the number of buses and trains and aircraft.

Returning to the role of the FBI, as Agent Wilson told us, in the fullness of time in the fall he caused requests or directives to go out to various special agents in charge in the field, particularly to cities including, of course, the City of New York.

As a result of those requests for investigations, Agent Thomas Croke, one of the supervisors in the New York office, and other agents here in New York, set about to collecting information and making arrangements to collect more information prior to and during the moratorium day activities.

As has been stipulated and conceded, the Washington Headquarters of the FBI, most particularly the group under the leadership of Agent Malone, disseminated, principally by telephone and teletype and by oral conversations and meetings, ongoing information from day to day to various other government agencies, including the United States Park Service, the Secret Service, which includes the White House Police, the United States Department of State, the United States Department of Justice, the United States Internal Revenue Service, the Office of Special Investigation, sometimes THE OSI, and, too, the United States Air Force.

Here in New York, the Assistant Director's Office disseminated such information as was gleaned here to the New York Office of the Secret Service, the 108 Military Intelligence Group, the New York Office of the OSI and the Naval Investigative Service Office of the United States Navy here in New York City.

When this case was commenced, as the complaint itself indicated, and, indeed, as the pretrial conference sessions indicated, it was a principal contention and legal theory of the plaintiffs that their constitutional rights were improperly intruded upon by the defendants in that the FBI was alleged to have obtained and prepared dossiers on various persons affiliated in some way with the Fifth Avenue Peace Parade Committee, and all other persons who may have traveled from New York City, for example, to Washington by bus, having acquired a ticket through the auspices of either the Fifth Avenue Peace Parade Committee or one of its subordinate or affiliated committees, groups, or organizations.

It was also alleged that the FBI surveilled and obtained photographs of such persons as they were preparing to and actually did board buses to go to Washington to implement their First Amendment rights to demonstrate against the war in Southeast Asia.

Therefore, it was perfectly understandable that a considerable amount of pretrial investigative activity by counsel centered upon what the FBI did, most particularly in regard to obtaining information with a co-defendant in this case known as the Amalgamated Bank.

The Amalagamated Bank, of course, is a bank located down near Union Square and, of course, as everybody knows as a result of the evidence in this case, it appears clear that the Special Agent Anthony Constantino made several visits to the Amalgamated Bank and to, perhaps, other banks, but as the proof developed, it only became important in relation to his visits to the Amalgamated Bank.

Of his visits, perhaps the most important was that exhibited by his 302 report which has to do with the visit he made on November 6th to the Amalgamated Bank's office on Union Square.

Of course, while he was there he got information on an account under the name of the Washington Transportation Fund and, in reviewing the new account card the resolutions card, he noted the names of Norma Becker, coordinator, Leon Craig, administrator, and Judy Berr, secretary. These were the persons authorized to sign.

He also ascertained that the names of Abe Weisburd and Deborah D. Weisburd on another affiliated account was opened under the name of the Labor Committee to support Washington action with an initial deposit of $1000.

It is, of course, true that Deborah D. Weisburd is the lady who is one of the two individual plaintiffs in this action.

Mr. Constantino testified here, and he testified that of course he did obtain this information and that he did prepare a 302 report in what he regarded, of course, as the usual course of his business under his assignment in connection with this particular investigation.

It is also true, and there is no dispute about this, that after the moratorium activities, the weekend of November 15, 1969, the New York Assistant Director's office pulled together a rather substantial file the basic pages of which number some 200 in all with the identifying number of NY 100-167288.

This report was pulled together and then disseminated to the agencies I mentioned heretofore, or to some of them, after the events in question.

During the course of the trial Deborah Weisburd did not appear as a witness, Robert Silk did. Norma Becker appeared as a witness, and Abe Weisburd, the husband of Deborah, appeared as a witness.

Now, we also heard expert testimony from a psychologist. If I may say so parenthetically, a very attractive lady psychologist, Pamela Levin. Her specialty is social psychology.

Without extending discussion of the nuances, interesting as they were, of her testimony, and the reasons which she gave to support them, I have no quarrel with her conclusion that surveillance of an individual, or investigation of an individual, for whatever purposes, may well have the effect of causing that individual to hesitate before expressing himself. Human nature being what it is, I also have no trouble in agreeing with her that certain persons are more

affected in this respect than others or, to use that unfortunate phraseology that lawyers and judges in recent years have been so wanton to use, it is more likely, understandably, that certain types of persons find that their right of expression are chilled or inhibited more than others. I don't think there can be any doubt of that as a practical matter and, of course, the significance of this evidence, I must assume, was to show that once it came to the attention of these plaintiffs and any persons affiliated with Fifth Avenue Peace Parades that there was an FBI investigation, it is, of course, the argument that this Court should infer, without more, that their First Amendment rights were chilled or inhibited in breach of the Constitution of the United States and its laws.

I might add that the witnesses who did appear, Miss Becker, Mr. Weisburd and Mr. Silk, admitted that they never did hear about the FBI investigation until long after the moratorium events on the weekend of November 15th.

More than that, they frankly conceded that the nature of the hearsay reports which they received were conjectural and vague as necessarily they had to be.

I also find beyond a doubt whatsoever that the principal purpose of the FBI's role, aside and apart from the statutory underpinning of their investigatory powers, was to try and ascertain as well in advance as possible, but at least sufficiently in advance to be of use, how many people approximately were coming to the seat of government, how many buses were going to be entering the District of Columbia, and how many trains and aircraft would be disgorging people at the railroad station and the airports across the river.

The FBI was also concerned with any potential security risks, meaning by that, of course, persons with a known record for violence, persons who might have uttered threats against Government officials, and the like.

The argument has been made, incidentally, at least by implication, that since the new Mobilization Committee was furnishing its estimates, there was therefore no need for any Government investigation on these subjects, I regard as a red herring, to put it politely, and that should be stripped out of this case forthwith because of the obvious reasons that even though the FBI regarded the estimates which they were getting as being thirdhand from the new Mobilization Committee as made in good faith, no responsible agency such as the FBI should ever feel that it is limited to one source of intelligence on that kind of a difficult subject.

One need say no more about this issue which, in my judgment, is only an issue in quotes.

It also appears beyond any doubt that here, on the New York end, the Bureau was very concerned about the bus problem because of the fact that it was a very uncertain proposition from day to day no matter what the best efforts of the Fifth Avenue Peace Parade Committee and other groups' efforts were as to how many buses would come even when the funds were put up for those buses.

Some of the reasons for this appear in the record only fleetingly, but I am inclined to infer, without any great doubt about what really transpired, the following, and that is, that various groups, like Allied, who do not own their own buses, were having extreme difficulty in getting firm commitments from bus owners as to how many buses they might produce on a given day. In part, this was due to the

fact that certain bus drivers who felt, for political reasons, that they were opposed to this moratorium, might not want to drive.

In other regards it was due to the fact that finances could not be raised overnight despite the best efforts of Fifth Avenue and others, and therefore certain bus companies were reluctant to make firm commitments until they saw cash on the barrelhead.

Hence, the FBI, until the very last minute, including the early morning hours of November 15, 1969, patiently set up surveillance teams or individual agents at some 56 or 57 points throughout the city so that they could get last minute accurate reports of the number of persons boarding the buses and the number of buses departing.

This information was obtained by these agents, called in to the New York headquarters to one central phone, and that office, in turn, saw to it that the information was transmitted swiftly by phone to Washington.

There was no effort made by the FBI to obtain the identities of these persons who boarded these buses. Other than these persons mentioned on these account cards, there is no evidence that the FBI had the slightest concern with the identity of the persons in these groups such as the Fifth Avenue Peace Parade Committee.

I pause parenthetically to note that during the pretrial proceedings this Court asked the Attorney General, recognizing as the Court does the obligations, at least generally, of the Attorney General under the official Secrets Act and otherwise, to be given an opportunity to fulfill its responsibility, as to whether or not the Attorney General would release for our use in this case, that is, for dissemination to all sides in this case, the aforementioned 200-page general summary report of the Bureau here in New York.

The Attorney General, through the Assistant United States Attorney representing the defendants in this case, at the outset of the trial notified the Court that the Attorney General was declining this suggestion or invitation of the Court.

However, I should note, and I do not think I will intrude upon any responsibilities of the Attorney General or violate any State secrets by observing that I have read the report, and I find no evidence in there to undercut or erode or cast doubt upon the finding I just made a moment ago to the effect that the FBI had not the slightest concern about the identity of these persons.

There is only one possible exception and that has nothing to do with this case or with this affair, namely, the Moratorium Day parade.

That person and that affair, having nothing to do with this case, I decline to, of course, indicate or identify him on the record.

In turning to my conclusions of fact and law, I note at once that there is absolutely no evidence that the Government, through the FBI or, indeed, through any other agent, photographed any of the persons here involved, whether you consider them to be named plaintiffs, officers, officials, or agents of Fifth Avenue Peace Parade, or even in the class which, imputatively, at least, is represented by these plaintiffs.

Second of all, there were no dossiers compiled or disseminated on the named plaintiffs, or any of the members of the class, that is, persons who went to Washington on one of these buses to exercise his rights at the demonstrations against the war in South Vietnam.

So those two issues which were originally bruited about somewhat passionately, and understandably, no doubt at the outset of this litigation have no factual support whatsoever.

However, there is a third facet of this case, or a third and fourth facet which I will lump under one heading.

I start out here by assuming arguendo, at the very least, that the plaintiffs are right when they argue that in theory there could be an unconstitutional action on the part of a surveilling agency if that surveilling agency, properly gathering information, nevertheless takes the fruits of its investigation and disseminates it broader than is necessary or, to put it differently, disseminates the information to other persons or agencies who have no reasonable use for same. I make that assumption.

Nevertheless, in having made that assumption, I believe that the plaintiffs failed to prove by a preponderance of the evidence that there was an improper dissemination here with one exception to be noted.

I believe that the record supports that it was reasonable to disseminate the information both from New York and Washington to the various groups and agencies which have been identified by stipulations of counsel in this case and by the testimony of Agent Phillip Wilson.

The one exception that comes to mind is the Internal Revenue Service. I read the government's answer to the interrogatories stressed by Mr. Handler in his so-called rebuttal case to be an admission that the information pertaining to the plaintiffs in this case were disseminated to, among other groups, the Internal Revenue Service.

However, I can assume that the FBI—and I so find by the way—cannot be faulted on constitutional or other grounds for so disseminating this information.

As government counsel argues, somewhat simply but I think sufficiently to indicate the point, the Internal Revenue Service is interested in money and funds, and presumably they would be interested or could possibly have an interest, for reasons beyond my immediate competence to know, to be interested in bank accounts of this kind.

There is one other possibility. Although Agent Wilson was frank to admit that he did not know this directly, he did, in effect, make the assumption that the security people in the Internal Revenue Service hierarchy might have been concerned about possible demonstration side effects against an IRS installation in Washington. I don't press that point but, on the other hand, as a United States District Judge I cannot assume that that was totally unwarranted on this record.

Finally, I should note two other possible exceptions. I am inclined to think that the Air Force and Naval Intelligence establishments could possibly have had good reason to receive this information if for no other purpose than to be on their guard to secure their installations, not only in Washington, most directly, but even in the preliminary stages I suppose that the officers here in New York City could have conceivably have been concerned about possible demonstration side effects here in New York on that day, and that those military establishments, given the nature of the moratorium day activities, were perhaps more vulnerable than others to any New York demonstration activity side effects. I do not say this lightly because I happen to work in a building where we get notable demonstration activity side effects right outside on Foley Square even though the Court has nothing whatsoever to do with anybody concerned with it, but nevertheless it does represent a

federal presence of a sort and therefore these things do happen.

In trying to balance what I conceive to be the rights of the plaintiffs to be free of completely unwarranted dissemination of information about them, I cannot say that this dissemination was totally unwarranted.

Therefore, in accepting arguendo this legal theory of the government, I am in effect concluding that the plaintiffs have failed to make a case by a preponderance of the evidence that the dissemination was purposeless or unwarranted.

I further find that the plaintiffs failed to prove by a preponderance of the evidence that their rights were realistically in any way inhibited, given the dissemination.

I say this for two reasons: First of all, they did not learn about any of this until this litigation was well under way, the only exception to that last statement being that they did hear rumors, prior to their deciding to commence the suit, that the FBI had indeed investigated some part of this.

Obviously, however, they couldn't know about the dissemination to such groups as the Internal Revenue Service, or one of these military intelligence groups, until the facts were gleaned by their diligent counsel in pretrial discovery.

Therefore, this Court ruled that this complaint must be dismissed on the merits and judgment should be entered accordingly.

Now gentlemen, is there any misstatement of fact that I made in the judgment of either or both of you, or is there any subject I left out in my findings and conclusions of law?

(No response.)

The Court: Perhaps Mr. Riesel, since you are the winning lawyer, it makes sense to really lean on you the

most, at least in the first instance. Is there anything you feel that I left out.

Mr. Riesel: No, your Honor.

The Court: Mr. Handler, is there anything you feel that I left out?

Mr. Riesel: Your Honor, excuse me. It may be proper to make a finding as to the methods and the efficiency of the FBI's conduct of this investigation.

The point I want to make is that I think it is very obvious from the testimony here that the FBI conducted a neat and discreet investigation.

The Court: Well, I didn't say otherwise. I won't argue with you but I didn't say anything to the contrary.

Mr. Handler: Your Honor, I would like to suggest that your Honor's references to the difficulties in getting buses, which your Honor labelled as being somewhat assumed in view of the fleeting references in the record, I would say that one of the things which your Honor alluded to in your findings was that the reason why there was difficulty in getting commitments from the bus companies was because of the financial situation.

The Court: I did, and I think I have something more than fleeting allusions to rely upon on that score, by the way.

What was the name of that allied man?

Mr. Handler: Mr. Goldberg.

The Court: Yes, Norman Goldberg. Perhaps he wasn't the most articulate fellow in the world, or perhaps we didn't give him a chance to expand much, but I understood him very clearly, and I would think it would be astonishing if it were otherwise. These demonstrations and arrangements to bus people or to train people are very difficult. Moreover, they are always amateur people. They are not

professional. Inevitably there is going to be ambiguity with respect to things of this kind and to say that is not to fault the plaintiffs or anybody similarly situated. They were doing the best they could.

Let me go further. Goldberg testified, in addition to that, that some of the bus companies—and he meant by that companies which had buses higher—begged off at the last minute because of concern about damage from rioters, as he saw it, and the like.

Therefore, there was constant uncertainty right up until the morning of November 15th as to exactly how many buses and people were going.

Now, I'm sorry, I will add to that further, that even if the buses had been known to an exact number, nobody with the best of intentions and the best of records could have been very certain of how many people were going to show up.

It is common knowledge that demonstrations and their attendance turn on such matters as the state of the weather, the state of the health of the demonstrators on the day in question, and so forth. I could take judicial notice of those facts, I think, because I see it happen right here in this square.

All right, thank you gentlemen.

I think, Mr. Daniel Riesel, it might be useful from the Court's point of view, and from the clerk's office point of view, and perhaps from the government's selfish point of view as a litigant, to submit a proposed judgment to the clerk.

Mr. Riesel: Yes, your Honor, we will.

APPENDIX C

Judgment of Court of Appeals Entered on June 12, 1973

72-1439

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of June, one thousand nine hundred and seventy-three,

Present:

HON. PAUL R. HAYS
HON. WILLIAM H. MULLIGAN
HON. JAMES L. OAKES

Circuit Judges,

THE FIFTH AVENUE PEACE PARADE COMMITTEE, an unincorporated association and DEBORAH D. WEISBURD and ROBERT H. SILK, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

v.

L. PATRICK GRAY, as Acting Director of the Federal Bureau of Investigation, JOHN E. MALONE, as Assistant Director in charge of the Federal Bureau of Investigation in New York City, and THE AMALGAMATED BANK OF NEW YORK,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellants.

A. DANIEL FUSARO
Clerk

by VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX D

Denial of Petition for En Banc Hearing

72-1439

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 10th day of July, one thousand nine hundred and seventy-three.

Present:

HON. PAUL R. HAYS,
HON. WILLIAM H. MULLIGAN,
HON. JAMES L. OAKES,

Circuit Judges

THE FIFTH AVENUE PEACE PARADE COMMITTEE, an unincorporated association and DEBORAH D. WEISBURD and ROBERT H. SILK, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

v.

L. PATRICK GRAY, as Acting Director of the Federal Bureau of Investigation, JOHN E. MALONE, as Assistant Director in charge of the Federal Bureau of Investigation in New York City, and THE AMALGAMATED BANK OF NEW YORK,

Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
Clerk

• • • • •

Judge James L. Oakes voted to grant the petition for rehearing

In The

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1973

No. 73-741

THE FIFTH AVENUE PEACE PARADE COMMITTEE, an unincorporated association and DEBORAH D. WEISBURD and ROBERT H. SILK, Individually and on behalf of all other Persons similarly situated,

Petitioners,

vs.

CLARENCE M. KELLEY, Director of the Federal Bureau of Investigation, JOHN F. MALONE, Assistant Director in Charge of the Federal Bureau of Investigation in New York City and THE AMALGAMATED BANK OF NEW YORK,

Respondents.

BRIEF FOR RESPONDENT THE AMALGAMATED BANK OF NEW YORK IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT THE AMALGAMATED BANK OF NEW YORK IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STATEMENT

Respondent The Amalgamated Bank of New York (the "Bank") took no position below with respect to any of the issues raised as between petitioners and respondents Kelley and Malone. Similarly, the Bank takes no position with respect to any of the issues raised in the Petition for Certiorari as between petitioners and respondents Kelley and Malone.

Statement

Issues involving the Bank were litigated in the District Court and resolved in the Bank's favor. Such issues were not raised in the Court of Appeals and are not raised or referred to in the Petition for Certiorari. Thus, the Bank contends that there is no basis for the issuance of a Writ of Certiorari with respect to any issues involving it. The Bank respectfully submits to the Court herewith, as Appendix A, a copy of the five-page Brief submitted by it to the United States Court of Appeals for the Second Circuit, which concisely sets forth the Bank's position with respect to the matters herein.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THE FIFTH AVENUE PEACE PARADE COMMITTEE, an unincorporated association and DEBORAH D. WEISBURD and ROBERT H. SILK, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

-against-

L. PATRICK GRAY 3rd, Acting Director of the Federal Bureau of Investigation, JOHN F. MALONE, as Assistant Director in charge of the Federal Bureau of Investigation in New York City, and THE AMALGAMATED BANK OF NEW YORK,

Defendants-Appellees.

BRIEF FOR DEFENDANT-APPELLEE THE AMALGAMATED BANK OF NEW YORK

Statement of the Case

As the litigation below developed, the role of defendant-appellee THE AMALGAMATED BANK OF NEW YORK (the "Bank"), proved to be extremely limited. And, for the reasons set forth below, it is neither necessary nor appropriate for the Bank to take any part in the arguments on appeal.

Appendix A

The claim asserted against the Bank, as set forth in the Complaint (A8) arose out of the undisputed facts that the plaintiff THE FIFTH AVENUE PEACE PARADE COMMITTEE (the "Committee") (i) had opened an account with the Bank under the name of "Washington Transportation Fund", (ii) had solicited and received payments from many individuals for bus tickets for transportation to the demonstration held in Washington, D.C. on November 14-16, 1969, (iii) had deposited these payments (most of which were personal checks) into the Washington Transportation Fund account, and (iv) had drawn its own checks on the account to pay for the chartering of buses from the Allied Bus Corp. The essence of the Committee's claim against the Bank, as alleged in the Complaint, was as follows:

> "9. Upon information and belief, at various times during October and November, 1969, agents of the FBI visited the Bank and examined the records maintained by the Bank concerning the Account (the "Bank Records").
>
> 10. Upon information and belief, said agents reproduced the Checks and the Bank Records by photographic, electrostatic or other photocopy reproduction methods.
>
> 11. Upon information and belief, agents of the FBI compiled, by their examination of the Bank Records, a list of names of those persons who had purchased Moratorium Day Tickets by paying for such tickets with personal checks (i.e., the Individual Plaintiffs and the members of the Class)."

Appendix A

The Complaint further alleged that the FBI's copying of checks at the Bank and compiling of a list of contributors to the Washington Transportation Fund was unlawful and in violation of plaintiffs' constitutional rights.

The Bank has at all times denied the specific allegations relating to it contained in paragraphs 9, 10 and 11 of the Complaint, has denied that the individual checks deposited in the Washington Transportation Fund were copied or in any way listed by or for the FBI or any other government agency, has denied that any list of contributors to the Washington Transportation Fund was complied by, from or with the assistance of, records of the Bank, and has denied that it did anything that was unlawful or was in violation of plaintiffs' constitutional rights.

As it turned out, the allegations of paragraphs 9, 10 and 11 of the Complaint were untrue and utterly unfounded and the Bank's denial thereof was correct. In fact, it was apparent by the time of trial that, while plaintiffs had refused to withdraw the allegations made against the Bank, they had shifted the primary emphasis of their case to a new theory -- that the entire governmental investigation was illegal and unconstitutional irrespective of what had happened at the Bank (See, *e.g.*, Pre-Trial Order, A146-150). Accordingly, almost all of the evidence and argument at the trial was devoted to other issues in which the Bank was not involved.

Appendix A

The only evidence offered by plaintiffs with respect to the allegations made against the Bank was testimony of FBI Agent Anthony Constantino to the effect that he had been assigned to locate the bank account of the Committee, ultimately located the account at the Amalgamated Bank, spent about 15 minutes there (A267), and was given "the name of the account, the address, the individuals connected with the account and probably the signature cards for the account" (A242). He did not photostat or copy checks or compile any list of checks or contributors (A266). He made no further inquiry about the account and believed that no other agent did so either (A261). All of the information he obtained was listed in his concise one-page report (Exh. 2). The only aspect of the investigation that included the Bank in any way was this brief fifteen minute inquiry.

At the close of the plaintiffs' case, the District Judge found that there was no evidence whatsoever to support the allegations of paragraphs 9, 10 and 11 of the Complaint and that the sole investigation at the Bank was as testified to by Agent Constantino. He ruled that nothing unlawful or in violation of plaintiffs' constitutional rights was done by the Bank. He, therefore dismissed the case as against the Bank (A403-411).*

Neither Questions Presented nor the Argument in the brief filed by plaintiffs on this Appeal in any way attack

* The Appendix does not contain the full transcript of this portion of the proceedings, and the Court may wish to refer to the transcript of the proceedings of January 21, 1971, as contained in the Record on Appeal, pp. 417-459, and particularly pp. 425-26 and 446-47.

the District Court's finding of fact with respect to the scope of the investigation actually conducted at the Bank or its ruling dismissing the case as against the Bank. Accordingly, it is clear that such finding and ruling, which were unquestionably correct, are not really at issue on Appeal and should be affirmed.

CONCLUSION

The District Court's finding of fact with respect to the scope of the investigation conducted at The Amalgamated Bank of New York and its ruling dismissing the complaint as against the Bank were correct and should be affirmed.

Respectfully submitted,

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THE AMALGAMATED
BANK OF NEW YORK

ALAN G. BLUMBERG
Of Counsel

SUPREME COURT, U. S.

FEB 6 1974

MICHAEL RODAK, JR., CLERK

No. 73-741

In the Supreme Court of the United States

OCTOBER TERM, 1973

THE FIFTH AVENUE PEACE PARADE COMMITTEE ET AL., PETITIONERS

v.

CLARENCE M. KELLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

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CLARENCE M. KELLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners, an unincorporated association and certain members thereof, brought suit in the United States District Court for the Southern District of New York against the Director of the Federal Bureau of Investigation ("FBI"), the Assistant Director in charge of the FBI offices in New York City, and the Amalgamated Bank of New York, the bank in which the association had deposited funds. They sought (1) a declaration that the FBI's investigation of them, including an inspection of their bank records, violated their First, Fourth, and Ninth Amendment rights, (2) an injunction against further investigation or further dissemination of the investigative reports, and (3)

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destruction of the pertinent files. After a nonjury trial, the district court made oral findings of fact and conclusions of law (Pet. App. 23a–35a), and dismissed the complaint on the merits. A divided court of appeals affirmed (Pet. App. 1a–14a).

The investigation was conducted in connection with the Viet Nam Moratorium demonstration in Washington, D.C. in November 1969, of which the petitioner association was one of the sponsors. The purpose of the investigation, as both the court of appeals and the district court found, was to estimate the number of persons who would be attending the demonstration in order to make adequate preparations to assure its peaceable nature, and to determine whether any of the demonstrators were persons having a "potential record of violence" (see Pet. App. 4a, 10a–11a, 29a–30a).

Although the complaint broadly alleged that the FBI had made a full examination of the association's bank records, surveilled and photographed individuals who boarded buses in New York to attend the demonstration, and prepared dossiers on such individuals and others affiliated with the association, the district court found that the FBI made no effort to ascertain the identities of those who boarded the buses (Pet. App. 31a), took no photographs and compiled no dossiers (Pet. App. 32a). The court found that the FBI did no more than ascertain the size of the association's bank account and an affiliated account, incidently learning names of the persons authorized to sign checks thereon (Pet. App. 27a–28a), and surveil the departing buses only to the extent of ascertaining the number of persons boarding and the number of buses

leaving (Pet. App. 31a). While petitioners also alleged that a two hundred page summary of the investigation was "broadly" disseminated, the court found that it was distributed only to relevant government agencies, that it covered all investigative activities conducted in connection with the demonstration, and that only certain pages of the summary pertained to petitioners.[1]

Petitioners' contention that the government acted unlawfully in conducting this limited investigation and including its results in the dissemination to relevant government agencies was fully considered and properly rejected by the court of appeals, upon whose opinion we rely.

The court of appeals, relying on *Laird* v. *Tatum*, 408 U.S. 1, also held that petitioners had not presented a justiciable question. Petitioners point out that in *Laird* v. *Tatum* the respondents' challenge was directed at "the existence and operation of the [Army's nationwide] intelligence gathering * * * system" (408 U.S. at 3), and petitioners seek to distinguish *Laird* v. *Tatum* on the ground that its holding is confined to generalized challenges to government activity. In contrast, petitioners describe their claims as "individualized" (Pet. 13).

Petitioners, however, have misconceived the thrust of this Court's opinion in *Laird* v. *Tatum*. Like petitioners, the respondents in *Laird* v. *Tatum* were the subject of surveillance (408 U.S. at 39), and they, like

[1] This summary report in its entirety was reviewed by the district court *in camera* prior to making findings of fact (Pet. App. 32a–35a).

petitioners, did not claim that they had sustained or were "immediately in danger of sustaining a direct injury as the result of that action." This Court held that such a showing is prerequisite "to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action." 408 U.S. at 13.

Petitioners claim that they are intimidated by the knowledge that the FBI file is still maintained and disseminated (Pet. 13). The district court found, as noted earlier, that the FBI compiled no dossiers and took no photographs, and disseminated a report, only a small part of which referred to petitioners, solely to relevant government agencies. Petitioners thus simply make "[a]llegations of a subjective 'chill' " and as this Court held in *Laird* v. *Tatum,* such allegations "are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." 408 U.S. at 13–14.[2] See *Donohoe* v. *Duling,* 465 F. 2d 196 (C.A. 4).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

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[2] Petitioners' challenge to the FBI's limited inspection of its bank account records is without merit. Whatever restrictions may exist on the government's power to compel such disclosure, and whatever standing petitioners would have to challenge government-compelled inspection of records in the hands of third parties (See *Donaldson* v. *United States,* 400 U.S. 517), in the present case petitioners' bank voluntarily disclosed information to the FBI.

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